SUPREME COURT, U. S.
Supreme Court, U.S.
FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-931

JOHN A. VOLPE, *et al.*,
Petitioners,

v.,

D.C. FEDERATION OF CIVIC ASSOCIATIONS, INC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ROBERTS B. OWEN
GERALD P. NORTON
888 Sixteenth Street, N.W.
Washington, D.C. 20006
Attorneys for Respondents

Of counsel:
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

February 1972

WASHINGTON, D. C. SAHEL PRESS 202 393-0625

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STATUTES AND REGULATIONS INVOLVED

Since the portions of Section 23 of the Federal-Aid Highway Act of 1968, 82 Stat. 827, set forth in Appendix H to the petition, omit certain material provisions, the relevant parts of Section 23 are fully set forth in Appendix A, *infra*, Q.A. 1a-2a.[1] In addition to the statutes cited in the petition (Pet. 2), the case also involves

[1] The appendix to the petition is referred to herein as "P.A." The appendix to this brief in opposition is referred to as "Q.A." The petition is referred to as "Pet."

a regulation promulgated by the Department of Transportation to implement 23 U.S.C. § 128, entitled Policy and Procedure Memorandum 20-8 ("PPM 20-8"), 23 C.F.R., pt. 1, App. A (1971), which is reproduced in relevant part in Appendix A, *infra*, O.A. 2a-3a.

QUESTIONS PRESENTED

1. Where Federal highway officials are under admitted political pressure to commence immediate construction of a controversial highway bridge as to which plans have never been prepared or hearings held, and where they then depart from all standard procedures and commence construction of a set of bridge "piers" without knowing (a) whether a bridge structure can safely be built upon the piers, (b) how the bridge is to be connected to other traffic systems, (c) how the project will affect park lands, historic sites and the environment, or (d) how the entire project will relate to transportation planning in the area, was it reversible error for the courts below to conclude factually, in such unique circumstances, that the administrative decision to commence immediate construction was "premature" in relation to the planning, design and public hearing requirements of the Federal highway laws?

2. Where an act of Congress applicable only in the District of Columbia provides that the District of Columbia Government should proceed with a local highway project "in accordance with all applicable provisions" of the Federal-aid highway laws, was it reversible error for the United States Court of Appeals for the District of Columbia Circuit to interpret this purely local statute as requiring this particular local project to be planned, designed and constructed in accordance with the legal requirements which are applicable generally to all projects constructed under the Federal-aid highway laws?

COUNTERSTATEMENT

The instant petition seeks to involve this Court in a local transportation controversy, aptly termed a "long and sometimes acrimonious imbroglio," involving the proposed "Three Sisters Bridge" across the Potomac River (P.A. 2a). In view of the complexity and uniqueness of the project's history, it is clear that the official conduct involved in this case is without precedent and will almost certainly never be repeated, either in the District of Columbia or anywhere else in the country.

The events surrounding the filing of the instant petition are also extraordinary. As is commonly known, and as is amply explained in the findings of fact below (P.A. 24a-25a, 76a-88a), the Federal Government and the District of Columbia Government for many years have been attempting to obtain Congressional appropriations for the construction of a rapid transit subway system in the Washington Metropolitan area, and Representative William Natcher of Kentucky has been using his unique Congressional position (as Chairman of the District of Columbia Subcommittee of the House Committee on Appropriations) to block the appropriation of the subway funds until acutal commencement of construction of the Three Sisters Bridge—a project which the District of Columbia's planners consider unnecessary and undesirable (P.A. 12a, 145a).

On October 12, 1971, the court of appeals below held that the construction of the bridge could not lawfully go forward until certain planning steps had been taken as required by Title 23 of the U.S. Code (the Federal-aid highway laws) (P.A. 5a-23a). The immediate result was a continued freeze of the subway funds, threatening financial starvation for the entire subway system. In this crisis the President of the United States publicly announced on November 18, 1971 (immediately after Mr. Natcher's committee had voted to withhold the subway funds[2]) that one

[2] *Wash. Evening Star*, Nov. 19, 1971; *Wash. Post*, Nov. 19, 1971.

of the things that "has to happen" in order to "save" the subway system was to have the Attorney General of the United States seek reversal of the court of appeals' decision; accordingly, the President "ordered" the Attorney General "to file a petition for certiorari with the Supreme Court."[3] While the President's order had the desired effect of placating Mr. Natcher and obtaining release of the subway funds,[4] it also serves to distinguish the instant petition, *prima facie*, from normal Government certiorari petitions which are filed by the Solicitor General on his own initiative.

The contents of the petition are also unusual in several respects. First, faced with the task of finding in this case some issue worthy of this Court's consideration, the authors of the petition have articulated a series of issues which were neither raised by the evidence nor decided below. The petition states that the court of appeals enunciated certain novel and general "holdings" which will be applicable to Federal-aid highway projects generally and which will have such an "important" impact upon the administration of "the Federal highway program" that review by this Court is appropriate (Pet. 6), but, as further discussed below, none of the asserted "holdings" was actually made in the opinion below. Secondly, although in terms of subject matter the petition is directed to the planning and design of Federal-aid highway projects, the petition's "Statement" of the case says almost nothing about the unique record facts as to the actual planning and design events which occurred in this case. In view of the petition's silence on this score, and since the extraordinary facts of the case control the nature of the issues which may or

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[3] 7 Weekly Compil. of Pres. Docs. 1534 (1971).

[4] Very soon after the President's announcement the subway funds were appropriated. See 117 Cong. Rec. H 11643-81 (daily ed. Dec. 2, 1971). Mr. Natcher noted his belief that the President "will carry out the commitments set forth in . . . the statement" of November 18, 1971. 117 Cong. Rec. H 12579-80 (daily ed. Dec. 15, 1971).

may not be presented for review here, the facts must be set forth at somewhat more than the usual length in this brief in opposition to certiorari.

A. THE STATUS OF PLANNING AND DESIGN WORK ON THE BRIDGE PROJECT ON AUGUST 23, 1968, WHEN CONGRESS PROVIDED THAT "WORK" SHOULD PROCEED ON THE PROJECT

On August 23, 1968, the Congress enacted Section 23 of the Federal-Aid Highway Act of 1968, 82 Stat. 827 (O.A. 1a-2a) providing that the District of Columbia Government, within 30 days thereafter, "commence work" on four local highway "projects," including the "Three Sisters Bridge" (an element of Interstate Route "I-266"), and that the projects be carried forward as Federal-aid highway projects "in accordance with all applicable provisions of title 23 of the United States Code." The type of "work" to be commenced on each project within the 30-day period was not specified, but the term clearly was not intended to require actual construction.[5] In fact the record discloses that as of August 23, 1968, much planning and designing work remained to be done before any actual construction work could possibly commence on the bridge. Specifically:

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[5]The petition inaccurately characterizes the statute as requiring that actual construction commence within 30 days (Pet. 2, 3, 6). That this interpretation is incorrect is readily demonstrable:

(1) The principal proponents of the statute in the House of Representatives said in their statement (upon which petitioners heavily rely) that they wanted "the first substructure contracts [to] be *advertised* for construction within *90 days* of the enactment of this legislation" (Pet. 18, quoting H. Rep. No. 1799, 90th Cong., 2d Sess. 34-35 (1968) (emphasis added)).

(2) The term "construction" as used in § 23(a) of the Act was clearly intended to include pre-construction study and analysis as well as actual building activity, as is indicated by the fact that the term includes the 18-month study which was to be undertaken with respect to projects covered in § 23(c) (O.A. 1a-2a).

(1) As of August 1968 the only bridge design or plan which the District Government had in hand was an artist's rendering or sketch depicting a daring single-span bridge reaching almost from shore to shore without any piers or supports in the main body of a river (PX 57).[6] The sketch showed a bridge only; it did not indicate the type, size or location of the ramsp, interchanges, and approach roads which would be necessary to connect the bridge to other, existing or new facilities.

(2) The Federal Department of Transportation ("DOT"), acting through its Bureau of Public Roads ("BPR"), had refused to approve the sketch involved because it appeared to call for "the longest pre-stressed concrete bridge of its type in the world" (P.A. 139a), and BPR did not know whether it would be possible to engineer and build such a structure with safety. (PX 69; *see* P.A. 139a n. 56). BPR itself characterized the project as "extremely hazardous and fraught with danger" (P.A. 140a) and less than a month after August 23, 1968, stated that it would be necessary to make a "comprehensive feasibility study" before proceeding further (P.A. 139a n. 56).[7] BPR therefore called for the building and testing of "scale models of this bridge and adjoining structure . . . before final commitment is made for this type of structure" (*Ibid.*).

(3) Before a river bridge can be constructed it is necessary (a) to determine (by test borings, etc.) whether the river bed at the chosen location is adequate to support the entire bridge, and (b) to prepare engineering designs for both a horizontal superstructure and appropriate supporting piers (Pet. App. 137a-38a). In August 1968 exploratory test boring was unfinished, and the engineering design-

[6] *See also* DX X and W, attached to affidavit of Thomas F. Airis submitted in support of defendants' motion for summary judgment.

[7] BPR was also "gravely concerned over the massive appearance of the bridge which is equivalent in height to a six-story building" at its ends (P.A. 139a n.36).

ing of superstructure and piers had not even begun (PX 40, 42, 55, 57, 61, 85).

(4) It was contemplated that traffic on both sides of the Potomac River should be given access to the bridge by a series of ramps and interchanges to be built within Federal park lands and areas designated as "historic sites,"[8] but the required planning report on the Type, Size and Location of such ramps and interchanges ("TS&L Report") had not been prepared (PX 145, p. 451; Tr. 1542-45),[9] so that it was not yet known which specific lands would be affected by the ramps and interchanges.

The result was that as of August 23, 1968, when Congress provided that "work" should proceed with respect to the bridge project, all of the following steps remained to be taken before actual construction work could commence:

1. The construction of a scale model of the novel bridge structure then proposed (in order to permit engineering testing for structural safety), and consideration by BPR as to whether the proposed structure would be structurally safe within the meaning of 23 U.S.C. § 109.

2. Test boring to determine whether the river bed conditions were adequate to support the proposed bridge structure and piers.

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[8]The park lands involved are (a) the Chesapeake & Ohio Canal Reservation and (b) park lands within the George Washington Memorial Parkway. The historic sites affected by the bridge include the Chesapeake & Ohio Canal and the Historic Georgetown District (P.A. 90a), both of which are on the National Register of Historic Places. 35 Fed. Reg. 2481 (1970).

[9]A TS&L Report -- setting forth the basic plan for all aspects of a project -- is required under normal BPR procedures and must be processed through and approved by BPR before the preparation of engineering designs (Tr. 481-87).

3. The preparation of a new mandatory TS&L Report on the bridge itself, if required by the results of the model testing.[10]

4. Analysis and approval by BPR of the final TS&L Report on the bridge itself (Tr. 481-87).

5. The preparation of TS&L Reports relating to the ramps and interchanges on both sides of the river (Tr. 1542-45).

6. Analysis and approval by BPR of the TS&L Reports on the ramps and interchanges.

7. Consideration by the Secretary of Transportation as to whether there were any feasible and prudent alternatives to the use of the park lands and historic sites, and whether the project included all possible planning to minimize harm to such lands, pursuant to 23 U.S.C. § 138.

8. Consideration by DOT as to whether the entire project, including the bridge and its ramps and interchanges, could be said to be based upon comprehensive transportation planning in the area pursuant to 23 U.S.C. § 134.

9. The preparation of the engineering designs—known as "contract Plans, Specifications, and Estimates" ("contract PS&E")—for the entire structure, including both superstructure and piers.[11]

10. Preparation of contract PS&E for the ramps and interchanges.

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[10] A TS&L Report incorporating some artist's renderings of a bridge design had been prepared by a private highway consultant in 1967 (P.A. 122a-23a), but as of August 1968 BPR had declined to approve the report because of doubts about structural safety. Indeed, as of the time of trial (June 1970) BPR had not yet approved that TS&L Report (P.A. 123a).

[11] Under BPR procedures, "contract PS&E" can be prepared only after BPR (a) has received and approved the TS&L Report and (b) has authorized the preparation of contract PS&E (Tr. 486-87, 990, 1543-45).

11. Analysis and approval by BPR of the contract PS&E (PX 90).

12. Authorization by BPR for advertising for bids for various actual construction tasks (PX 90).

13. Advertising for and receipt and analysis of bids, and approval of awards by BPR (Tr. 1047).

B. THE "WORK" DONE ON THE BRIDGE PROJECT IN THE PERIOD AUGUST 1968 THROUGH JULY 1969

It is undisputed that in the 12-month period following enactment of the 1968 Highway Act the highway officials involved (both D.C. and Federal) took *none* of the steps which, as indicated above, needed to be taken in order to permit construction to proceed. The reason for this inactivity is also undisputed. Immediately after the signing of the 1968 Act, the Secretary of Transportation expressed concern as to whether the proposed bridge project would be consistent with long-range comprehensive transportation planning for the area, and as a result the National Capital Planning Commission—the central planning agency for the Federal and District Governments[12]—was directed to draw up a comprehensive transportation plan for the area in order to provide a basis for judgment as to whether the proposed bridge could be built in conformity with the comprehensive planning requirements of 23 U.S.C. § 134 (P.A. 70a, 175a & n. 43). As noted in the petition (Pet. 3), NCPC did prepare such a plan in 1968; the plan indicated that the bridge should not be built; the D.C. Council approved the plan; the Mayor thereupon requested the deletion of I-266 (including the bridge and its approaches) from the Interstate Highway System; and in January 1969 DOT deleted I-266, thus deferring the project as a Federal-aid highway project. One of the rea-

[12] 40 U.S.C. § 71a(a). NCPC was under an explicit statutory mandate to prepare a comprehensive plan for the National Capital Region including a transportation element thereof. 40 U.S.C. §§ 71c, 71e.

sons for DOT'S deletion of I-266 was its conclusion that, since the bridge project was excluded from NCPC's 1968 plan, the project could not lawfully go forward consistent with the Congressional planning requirements set forth in 23 U.S.C. § 134 (Tr. 363-65, 371-72).[13]

In the summer of 1969, however, Representative Natcher brought "strong political pressure" to bear on both the District and Federal Governments in an effort to force them to move forward with the bridge project, again threatening the withholding of the necessary subway funds if construction of the bridge project were not commenced at once (P.A. 77a). It was found as a fact by the district court below (Pet. App. 80a) that the District Government "yielded to this pressure" by requesting reinstatement of I-266 in the Interstate System[14] and that Secretary Volpe immediately reinstated the route on August 12, 1969, simultaneously expressing the "hope" that his action would result in the release of the subway funds (P.A. 81a).[15] Immediately thereafter the President of the United States also notified Mr. Natcher that he "trusted" that Mr. Volpe's action satisfied Mr. Natcher's demands and that Mr. Natcher would now release the subway funds (P.A. 82a).

[13]It has never been suggested that this decision by DOT, made on advice of its General Counsel (Tr. 386), was improperly inconsistent with § 23 of the 1968 Highway Act.

[14]The petition states that in August 1969 "the D.C. Council reversed its previous action" of December 1968 (Pet. 3). That is not the fact. In December 1968 the D.C. Council approved the NCPC plan; thus disapproving the bridge project on its merits, and the Council's approval of the plan (and disapproval of the bridge project) has never been rescinded or revoked (Def. Ans. Interrog. No. 10 (2d Set)). The district court found as a fact that in August 1969, when the D.C. Council voted to proceed with the bridge project, it did so, not because it approved the bridge project on its merits, but only because it thought that it must build the unwanted bridge in order to obtain release of the wanted subway funds (P.A. 80a).

[15]Petitioner Volpe has claimed, as further explained below (pp. 20-23 *infra*), that at the time he reinstated I-266 he also made a number of legally-required factual determinations with respect to the

C. PETITIONERS' DECISION IN AUGUST-SEPTEMBER 1969 TO COMMENCE CONSTRUCTION OF THE PIERS FOR A BRIDGE STRUCTURE

In August 1969 petitioners found themselves in a difficult dilemma. On the one hand, Mr. Natcher was pressing for immediate commencement of actual construction work on the bridge, and petitioners were anxious to begin some sort of construction activity in order to obtain immediate release of the subway funds. On the other hand, BPR's engineers were of the view that the type of bridge structure then proposed was "extremely hazardous and fraught with danger" and that construction of such a bridge could not safely be commenced until scale-model testing had been completed (P.A. 139a-41a)—a process which has since taken a full two years and which may or may not be complete, even today.[16]

In the face of these difficulties petitioners made a truly extraordinary decision. Although they did not know, in September 1969, what sort of a bridge could or would be built, they decided—in "great haste" because of the "urgent" need "to appease certain members of Congress" and obtain release of the subway funds (P.A. 88a)—to let a contract

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bridge project and that he made each such factual determination on its merits without improperly taking into consideration the irrelevant problem relating to the release of the subway funds. The latter question was considered at length by both courts below (the district court finding that in fact the problem of the subway funds "was given some consideration" by Mr. Volpe in the decision-making process (P.A. 86a)), but since petitioners have chosen not to "consider" the issue here (Pet. 5 n.3), respondents can properly follow suit.

[16] The petition asserts that the model testing which was commenced after the district court's decision below (*i.e.*, after August 1970) "has since confirmed the structural feasibility of the proposed bridge" (Pet. 4 n.2), but there is nothing in the record on that subject, and, so far as we know, no testing results have ever been officially or publicly revealed, although Mr. Natcher did report that while under construction "the model . . . broke." 117 Cong. Rec. H 3756 (daily ed. May 11, 1971).

for construction of a set of *piers* in the river, even though petitioners did not yet know what sort of piers would be most appropriate to the type of superstructure to be selected in the future.[17] In any event, contract PS&E for a set of piers—exclusive of superstructure—were hastily drawn up; bids were solicited on an extraordinarily expedited schedule; a contract was let within hours; and Mr. Natcher was immediately notified that construction work (of a sort) was about to begin—at which point he agreed to release the subway funds (P.A. 87a-88a, 137a).[18] That this procedure was highly unusual was admitted by the responsible BPR engineer (Mr. Hall), who said that on only one other occasion in his 35 years' experience had he ever authorized construction of a set of piers before the structural feasibility of the bridge superstructure had been determined (P.A. 143a). In these circumstances it seems

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[17]Both courts below recognized that the "piers" of a bridge are "integral parts" of the structure and that a rational decision as to the type, size, number and location of the piers cannot be made until after the type of superstructure has been selected. For this reason the district court, with the concurrence of the court of appeals, held in effect that petitioners could not properly proceed with construction of a set of piers until they had selected and approved the design of the superstructure (P.A. 15a, 138a-44a).

[18]The petition repeatedly and erroneously characterizes the contract of September 1969 as having been limited to "preliminary" work such as "exploratory" subsurface borings (Pet. 3, 4 n.2, 10). In fact the original contract was for complete construction of the bridge piers within one year (Tr. 1043). The first stage of work included the subsurface exploration of river bed conditions, which revealed unexpected foundation problems, which in turn required a "major" contract revision (Tr. 601-03, PX 112) and led to such delays that, when work was enjoined eleven months later by the district court, no actual construction work on the piers had been done. The steel structure which can now be seen in the river is merely part of a temporary cofferdam put in place on the last day of work for use in connection with any actual construction work that might be done in the future.

extremely unlikely that such a set of facts will ever arise again in the administration of the Federal-aid highway system.

D. PETITIONERS' ALLEGED COMPLIANCE WITH TITLE 23 OF THE U.S. CODE AND THE CHALLENGED "HOLDINGS" OF THE COURT OF APPEALS BELOW WITH RESPECT THERETO

On the basis of the extensive record developed at trial, the district court held that petitioners, in authorizing construction of the bridge project to proceed in September 1969, had committed three violations of Title 23 of the U.S. Code and implementing regulations.[19] The effect of the resulting injunction, as entered by the district court, was to require the District Government and DOT to take additional planning and design steps before allowing construction to proceed, and in these respects the district court's rulings and order were affirmed by the court of appeals. None of these conclusions, on which there was no disagreement between the courts below, is challenged by petitioners.

As to five specific additional claims advanced by respondents below under Title 23 of the U.S. Code, the two lower courts disagreed. It is significant, however, that in virtually all of these five instances the court of appeals accepted the

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[19] The petition erroneously states that the district court found only two violations: (1) a violation of 23 U.S.C. § 109 (in allowing construction of the piers to begin before the safety of the structure had been determined), and (2) a violation of the regulations promulgated by DOT under 23 U.S.C. § 128 (in proceeding without holding a "design hearing") (Pet. 4). In fact the district court also held that petitioners had violated an additional requirement of 23 U.S.C. § 128 in that the District Government had failed to make a supportable certification that it had considered the social, economic, and environmental effects of the proposed project and its consistency with urban planning goals for the area (P.A. 133a-36a). The court of appeals expressly affirmed the first and third of these rulings but found it unnecessary to review the second (P.A. 15a, 18a & n.52, 20a n.57).

district court's view of the underlying facts and found fault only with the "reasoning" by which the district court reached its ultimate conclusion (*see, e.g.*, P.A. 10a, 16a, 17a, 19a). Petitioners' suggestion that the court of appeals set aside virtually all of "the district court's carefully documented factual findings" (Pet. 6-7 &n.4) is simply not true.

The basic theme of the petition is (a) that, with respect to four specific statutory provisions (23 U.S.C. §§ 134, 109, 138, and 128), the court of appeals below announced four "holdings," as general propositions of law, to the effect that actions taken to comply with these statutes are legally insufficient if taken before the completion of "final plans" for a Federal-aid highway project, and (b) that these four holdings, being decisive in the case, require corrective action by this Court. It is the respondents' position that in fact the court of appeals did not enunciate *any one* of the four supposedly decisive "holdings" now attributed to it. The facts and the "holdings" below with respect to each of the four cited statutory provisions are as follows:

1. 23 U.S.C. § 134 (the Requirement of a Comprehensive Transportation Planning Basis)

Section 134 requires that, before DOT can approve construction of a Federal-aid highway project in an urban area, DOT must make a factual determination that the particular project is "based on a continuing comprehensive transportation planning process carried on by States and local communities . . ."

(a) *The facts*

The only relevant facts are these:

In 1967 an unofficial regional organization, the so-called Metropolitan Washington Council of Governments ("COG"), expressed the opinion that the bridge project as then conceived would be "consistent with comprehensive planning in the region" as its existed in 1967, although it is the fact

that no comprehensive transportation plan for the region had ever been adopted as of that time (P.A. 14a, 146a).[20]

In 1968 NCPC (the central planning agency for the District and Federal Governments) adopted the first and thus far the only comprehensive transportation plan ever developed for the Washington area. The 1968 NCPC plan excluded the bridge project on the ground that it was both "unnecessary and undesirable" (P.A. 12a, 145a).

At the trial the responsible DOT official, Mr. Hall, took the position that in September 1969 he made the factual determination required by § 134 and that he made it by taking "mental" note of the 1967 opinion of COG with respect to the state of transportation planning in the region *in 1967* (P.A. 13a, 145a). His alleged "mental finding" of September 1969 (of which he made no written record) was based solely on the 1967 opinion of COG and without regard to the later NCPC plan—although both Mr. Hall and the district court agreed that NCPC's plan was "relevant" to the determination to be made under § 134 (P.A. 146a-47a).[21]

(b) *The holding of the Court of Appeals*

In concluding that Mr. Hall's alleged "mental" act of September 1969 did not constitute compliance with 23 U.S.C. § 134, the court of appeals relied upon one factual

[20] COG's opinion was obtained in connection with the Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C. § 3334 (P.A. 14a, 146a) and was not intended to provide a basis for a decision under 23 U.S.C. § 134, which DOT concedes has different requirements (Tr. 842-43).

[21] The petition asserts, erroneously and without record citation, that COG's 1967 opinion "was based on its planning process" (Pet. 9 n.7) and that COG has *approved* the bridge project "continuously since December 1967" (Pet. 3 n.1). The 1967 COG opinion was based on comprehensive planning in the region by all Washington area planning agencies, not COG's own planning process (PX 59), and there was no evidence that after 1967 COG ever reconsidered the bridge in light of NCPC's significant and admittedly relevant 1968 plan (Tr. 1110-11).

conclusion and one principle of law. The factual conclusion was that Mr. Hall, in relying solely upon the 1967 opinion of COG, had made no independent determination of his own as to whether the bridge project, in 1969, could be said to be "based" upon "continuing" transportation planning as it existed in the area in 1969. The court of appeals then applied the legal principle that the statute "does not permit the Department to delegate its statutory responsibility to a local planning agency" (P.A. 13a) and concluded that, since that was what Mr. Hall had done; the matter would have to be remanded to DOT for a reevaluation of the project under § 134. It should be emphasized that the instant petition does not challenge either the factual conclusion or the legal ruling which led to the decision to remand, so that the mandate of the court of appeals would be totally unaffected by whatever action might be taken by this Court.[22]

The petition now insists that "at bottom" the court of appeals held that no § 134 approval can be given to a Fed-

[22]In fact, the only quarrel which petitioners now have with the court of appeals under § 134 concerns one of several "misgivings" expressed by the court in a postscript designed "to aid the Department's re-determination under § 134" after the remand (P.A. 13a-14a). It was the court's view that, since "the planning" of the bridge, "including the approaches and access roads," had not been "finalized" in 1969 (P.A. 3a), Mr. Hall could not have been sure, in September 1969, what sort of a traffic facility would eventually emerge from the project-planning process, and it seemed possible to the court that the relationship between the project planning and area transportation planning would change as the project plans evolved. For that reason, said the court, it is difficult to see, "*without some explanation*," how the § 134 determination could be made in this case "*before* plans for the bridge are finalized," adding that in some circumstances such a determination *might* properly be made "in advance of the completion of planning" (P.A. 14a n.42; emphasis added). All that the court was saying, in other words, was that, after the remand; if DOT wanted to make the required § 134 determination before the project plans were finalized, it would be well advised to provide "some explanation" in order to eliminate a possible question as to whether or not it had properly complied with § 134.

eral-aid highway project "until the final plans are drawn" (Pet. 8-10). That is not correct. The court reached a conclusion of non-compliance with § 134 on a wholly independent and adequate ground (DOT's improper delegation) which had nothing to do with the presence or absence of "final plans" and which is not challenged here. The only § 134 aspect of the decision below which *is* challenged here is a statement of purest dictum—and an eminently sensible statement at that.[23]

2. 23 U.S.C. § 109 (the Requirement That the Project be "Safe")

Section 109(a) requires in effect that, before DOT can approve plans and specifications for a highway project, it must make a factual determination that the project as planned and designed will be "safe."

(a) *The facts*

The evidence adduced at trial raised three distinct questions as to the safety of the project as approved by DOT in August-September 1969:

—In the period from mid-1968 through trial in mid-1970 the responsible DOT officials were deeply and continuously concerned about this "extremely hazardous" project (P.A. 138a-43a). For that reason the district court found that as of September 1969 there was a substantial and unresolved question as to whether the bridge structure would be safe, and on that ground alone the district court enjoined petitioners from constructing any "integral" part of the bridge facility "until the responsible officials are convinced that *the entire facility* as planned is structurally feasible" and therefore "safe" (P.A. 144a; emphasis added). That conclusion was affirmed by the court of appeals (P.A. 15a) and is not challenged by petitioners.[24]

[23] *See* preceding footnote.

[24] In view of the district court's unchallenged ruling that petitioners had violated § 109 in entering into the construction contract of September 1969, the petition is wholly incorrect in stating that "[t]he district court held that the Department had *properly* let" the con-

—Respondents proved at trial by undisputed evidence that there was a substantial question as to whether the air pollution associated with the bridge project might create a safety hazard (Tr. 415Q, 416-17), and it was also undisputed that petitioners had made "no study of the possible air pollutional effects of the bridge project" (P.A. 104a). It was held by the court of appeals that, since DOT was going to have to reconsider the entire safety situation on remand in any event, it should be required to make at least some evaluation of possible pollution hazards before approving the project under § 109 (P.A. 17a & n.49). This ruling also is not challenged by petitioners.

—The evidence at trial raised a question as to whether DOT, before authorizing actual construction work, had adequately investigated the adequacy of the river bed to support the proposed bridge piers and structure. The evidence showed, among other things, that foundation conditions in the Potomac River have historically been a serious problem[25] and that at the time DOT authorized construction of the piers to proceed, it was not known whether or not the foundation conditions at the site were such as to permit the proposed bridge structure to be built (P.A. 137a-38a). Although these facts were not in dispute, the district court took the view that these open and unresolved questions as to the safety of the foundations of the bridge did not *by themselves* preclude approval of construction under § 109.[26]

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tract (Pet. 10) and that the district court made a "finding of compliance with §109(a)" (Pet. 10-11).

[25] *See, e.g.*, Tr. 601; PX 40, 61.

[26] However, the district court also held, as indicated above, that the open and unresolved questions as to the engineering feasibility of the superstructure *did* preclude such approval and required a remand of the safety issue to DOT.

(b) *The holding of the Court of Appeals*

The court of appeals took no position on the correctness of the trial court's ruling that the unresolved questions concerning the river bed were not sufficient in themselves to bar approval under § 109 in September 1969. Rather, since petitioners' alleged approval under § 109 had already been set aside on independent grounds not challenged here, and since a remand to DOT was thus necessary in any event, the court merely directed DOT's attention to an additional question to be considered on the remand:

> "The District Court's findings are not entirely clear as to whether questions about the safety of river bed conditions could be more fully resolved before construction resumes. We hold that *if* such questions do exist, the Secretary must take steps to resolve them to the fullest *practical* extent before granting approval of the project under § 109(a)." (P.A. 16a; emphasis added).

The petition seriously mischaracterizes the court's decision. It says that the court of appeals held that § 109 requires that "final plans" be prepared, that "all safety testing be done," and that final "conclusions . . . be reached 'on paper' " before any building can begin (Pet. 11). In fact, however, the court of appeals did not even consider any generally applicable rule as to the temporal relationship between the preparation of "final plans" and the required safety determinations. Insofar as challenged here the holding was simply that in this case, where a genuine safety problem had admittedly once existed with respect to physical foundations, the problem must be investigated, *if* it still exists, "to the fullest practical extent" before construction proceeds—a proposition which would seem to be compelled by common sense alone.[27] As far as § 109 is concerned,

[27] The district court itself observed that "[b]*efore* the construction of a bridge, it is *necessary* to make extensive investigations of subsurface conditions to determine if they are sufficient to support the foundations for the bridge piers" (P.A. 137a; emphasis added).

only this last conditional holding is challenged now, and a reversal by this Court would not alter the necessity of a remand to DOT.

3. 23 U.S.C. § 138 (the Requirements for the Protection of Park Lands and Historic Sites)

Section 138 of Title 23 prohibits the Secretary from allowing a Federal-aid highway project to be constructed through park lands or historic sites unless and until he has found (1) that "there is no feasible and prudent alternative to the use of" such park lands or historic sites and (2) that the proposed project includes "all possible planning to minimize harm" to such lands.[28] Respondents contended below that in this case the Secretary had not properly made either of the required determinations, and both of those issues were discussed at length in the court of appeals' opinion. The instant petition, however, is directed only to the second of the two issues—namely, whether the Secretary could have properly concluded in August 1969 that the proposed bridge project included "all possible planning to minimize harm" to the park lands and historic sites which would be affected by the bridge and its connecting ramps and interchanges.

(a) *The facts*

The facts relating to the Secretary's alleged "all possible planning" determination are as follows:

—In August 1969, when the Secretary claims to have made his determination that "all possible planning" had been done, neither DOT nor anyone else knew what kind of a bridge would ultimately be built across the river (*see* pp. 5-9 *supra*). Since the type, size, and location of connecting ramps and interchanges would necessarily depend upon the type, size, and location of the bridge itself (none of which had yet been determined), any existing,

[28] *See generally* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

notions as to the nature of those ramps and interchanges would necessarily have been entirely speculative.

—The Secretary testified vaguely that there had been some "preliminary planning" done with respect to the ramps and interchanges to be built upon the park lands and historic sites (P.A. 103a), but under subpoena DOT was unable to produce any such "preliminary plans" or other pertinent documents.[29] The Secretary then formally admitted below that there were none,[30] and none are in the record.[31]

—The district court found, with the concurrence of the court of appeals, that as of August 1969 no "designs" for such ramps and interchanges had been developed; such design work remained to be done in the future (P.A. 103a).

—It is clear that in August 1969 DOT did not know what sort of "harm" would be done by the bridge project to the affected park land and historic sites (the essential environmental elements involved), because four months later DOT still did not know what sort of bridge, ramps and interchanges would be built and could not accurately determine (in its own words) "the impact of . . . [this] massive structure upon the environment . . ." (PX 107).

—The petition states flatly, and without record citation, that "the impact that the bridge and its approaches . . .

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[29]The petition states that Mr. Volpe had before him "an artist's rendering" of the bridge (Pet. 12), citing Tr. 723, 728, and 804, but neither those pages of the transcript nor any others support the proposition that Mr. Volpe examined any "artist's rendering" at the time of his § 138 action. Moreover, there was no "artist's rendering" that gave any indication of the arrangement of connecting ramps and interchanges and their impact on protected lands. *See* p. 6 *supra*.

[30]Volpe Admission No. 3.

[31]The petition states that Mr. Volpe testified "that the approaches had been narrowed to two alternatives" (Pet. 12). However, all Mr. Volpe actually said was that "there are really only about two ways" by which "you can get traffic on to a bridge and off . . ." (Tr. 737), and neither Mr. Volpe nor any other witness ever explained what those "two ways" were.

[would] have on parklands . . . [was] known" to the Secretary in August 1969 (Pet. 13). That is not in accord with the record.[32] As indicated immediately above, the "impact" was very much in doubt both in August 1969 and four months later, and at the time of trial (June 1970) neither Mr. Volpe nor any other witness could say how much or which park land would be affected by the bridge and its ramps and interchanges, or in what manner (PX 157, pp. 30-31; Tr. 543, 546, 621).[33]

In view of the foregoing, the district court found as a fact, with the concurrence of the court of appeals, that in August 1969 Secretary Volpe did *not* conclude that "all possible planning to minimize harm" to the park lands had *already* been done; according to both courts, the only conclusion that Mr. Volpe reached on that subject in August 1969 was that he was personally "satisfied . . . that the designs which *would* be developed [in the future] . . . *would*

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[32] The petition states, surprisingly, that "[j]udicial notice may be taken of the fact that any bridge constructed across the Potomac River between Virginia and the District of Columbia will necessarily encroach on parkland" (Pet. 12 n.9). Not only would this be a misapplication of the doctrine of judicial notice, but the record refutes the asserted proposition (Tr. 160-61). Moreover, even if the proposition were correct, the fact that it might be necessary for the project to impinge upon *some* park land does not negate the obvious fact that the harmful impact will vary according to the different possible plans for the structures to be built on the park lands involved. Finally, there are obviously some alternatives to the bridge project (*e.g.*, a tunnel, *see* P.A. 100a) which need not have *any* adverse impact on park lands or historic sites.

[33] There were also other deficiencies in DOT's consideration, as of August 1969, of the environmental impact of the bridge project. For example, both courts below agreed that DOT had never undertaken a study of the possible air pollutional impact upon the park lands and historic sites (P.A. 11a, 104a), and both courts also agreed that petitioners had failed to conduct customary and legally-required consultations with the Advisory Council on Historic Preservation, *see* 16 U.S.C. § 470f (P.A. 11a, 104a), and other planning agencies (P.A. 11a, 104a).

result in a "minimum taking of parkland" (P.A. 10a, 103a; emphasis added).

(b) *The holding of the Court of Appeals*

In reviewing the foregoing facts the court of appeals took note of this Court's admonition in *Overton Park* "that § 138 can be obeyed 'only if there *has been* all possible planning to minimize harm to the park'" (P.A. 10a), and with that admonition in mind the court concluded that in this particular case "the necessary planning"—*i.e.*, the planning necessary to provide a basis for a conclusion that there *had been* "all possible planning to minimize harm"—had not been done *(ibid)*. In short, said the court, in the peculiar circumstances here involved the Secretary's approval of the bridge project in August 1969 was in fact "premature" (P.A. 11a).[34] Nothing in the opinion purports to lay down

[34] In commenting upon this holding the petition seizes upon the court of appeals' comment that "[a]bsent a finalized plan for the bridge, it is hard to see how the Department could make a meaningful evaluation of 'harm'" (P.A. 11a), and from that comment the petition draws the conclusion that the court was laying down the general principle of law that the Secretary can *never* validly approve a park-invading highway project until after the preparation of completely "finalized plans"—complete to the point of showing such engineering details as "reinforcing rods or the placement of rivets" (Pet. 13). We submit, however, that that is hardly a fair reading of the court's opinion. To the contrary, referring to all of "the applicable statutory provisions" of Title 23, including § 138, the court stated in effect that, in speaking of "final plans," it meant only plans which were sufficiently complete to permit meaningful appraisal in light of the statutory criteria, and that, once such plans had been thus completed, DOT could make its determinations under Title 23 even though some details or "ambiguities" might remain to be resolved at a later date (P.A. 14a n.42). In other words, as the court of appeals saw the issue, the only question before it was whether, in the circumstances of this particular case, DOT had done *enough* planning to permit it to determine that the harm to be done to the park lands and historic sites was at a minimum—and in this particular case the court reached a negative conclusion on that factual question.

any general rule of law as to when a § 138 determination is "premature" and when it is not.

It is apparent, moreover, that even if this Court should review the court of appeals' factual conclusion as to "prematurity" and disagree with it, such a reversal would have no effect upon the mandate below. The reason is that it is now very clear that in August 1969, when Secretary Volpe claims to have made his dual determinations under § 138, he applied the wrong legal standards in making his alleged determination with respect to "feasible and prudent alternatives." That this is so is demonstrated by the following: (1) Mr. Volpe's alleged § 138 determinations with respect to the Three Sisters Bridge were made shortly *before* his equivalent determinations in the *Overton Park* case (and long before this Court's instructive decision in that case), and (2) it has since been established at trial in the *Overton Park* litigation that in the period here involved the Secretary was in fact employing the wrong legal standards in making his "prudent and feasible alternatives" determinations under § 138.[35] The result is that, even if this Court should reverse the only aspect of the § 138 holding challenged in this case (*i.e.*, the court of appeals' conclusion with respect to "all possible planning"), the Court would nevertheless have to leave in effect the mandate requiring the Secretary to reconsider the § 138 question in accordance with the proper legal standards which this Court enunciated in *Overton Park*.

[35] Following this Court's *Overton Park* remand the trial court in that case found, on the basis of Mr. Volpe's testimony, that Mr. Volpe's interpretation of § 138 in 1969 was contrary to this Court's authoritative ruling. Citizens to Preserve Overton Park, Inc. v. Volpe, 3 E.R.C. 1510, 1514-16 (W.D. Tenn. Jan. 5, 1972). Moreover, on the basis of a record remarkably similar to this one, the court found the evidence "overwhelming" that Mr. Volpe had not considered alternative locations, despite his affidavit and testimony that he had. *Compare* 3 E.R.C. at 1513-14 *with* P.A. 92a-93a & n.31. Apparently accepting the court's ruling, Secretary Volpe has since announced that a thorough reconsideration will be made of both the location and design of Interstate Route 40 in Memphis (O.A. 4a-5a).

4. 23 U.S.C. § 128 (the Requirement of a Public Hearing As To Location)

In the proceedings below respondents raised three independent questions as to petitioners' compliance with 23 U.S.C. § 128 and DOT's implementing regulation thereunder. The courts below concluded that respondents were right on two of those three issues,[36] and those conclusions are not challenged by petitioners. The remaining § 128 issue arose under DOT's implementing regulation, so-called PPM 20-8, which provides that where changes are made in the location of a proposed highway project, "[b]oth a corridor public hearing and a design public hearing must be held" if any one of three conditions exists:

> "[Where the project] (1) Is on a new location; or (2) Would have a substantially different social, economic or environmental effect; or (3) Would essentially change the layout or function of connecting roads or streets." PPM 20-8, ¶ 6a (O.A. 3a).

The regulation further provides that in the event of "doubt as to whether a public hearing is required," then "[t]he opportunity for a public hearing *shall* be afforded . . ." PPM 20-8, ¶ 7a (O.A. 3a).

Although the petition never refers to the requirements of this regulation, petitioners are apparently asking this Court to review the court of appeals' decision concerning the regulation's application to the facts in this case.

(a) *The facts*

In 1964 the District Government held a public hearing with respect to three possible locations for a proposed "Potomac River crossing."[37] Of those three locations, the

[36] *See* p. 13 n. 19 *supra*.

[37] The petition errs in stating that the 1964 hearings covered "locations all the way from the vicinity of Theodore Roosevelt Island to Key Bridge to a location 2400 feet upstream from the Three Sisters Islands" and that they therefore covered "every conceivable location" (Pet. 14). In fact, the 1964 hearings covered only three specific locations (P.A. 111a); and consultants to the District Government,

one closest to the location proposed for the bridge project in 1969 was more than one-quarter of a mile downstream from the 1969 location; and the 1964 proposal contemplated substantially different "approaches" to the bridge itself.[38] The change in location also produced different "social, economic or environmental effects," as those terms are defined in the regulation (P.A. 128a-29a; O.A. 2a-3a). Indeed, the trial court found that, as compared with the alternatives considered in 1964, the 1969 proposal contemplated "a different bridge" which would use "[d]ifferent parkland and a different quantity of parkland . . ." (P.A. 131a-32a).

Given this state of the record, both courts below found it unnecessary to consider the legal question that arises under the regulation where (a) a public hearing has been held with respect to a particular location and (b) the highway officials involved decide, after the hearing, to change the location of the project. Both courts below agreed that regulation embodied the following companion principles of law: (a) that if the change in location was "so insubstantial that the public would not be affected any differently than by the original proposal which formed the basis for the first hearing," a new hearing would not be required, but (b) that if in fact the change was so substantial that the public would be affected differently by the new proposal, a new hearing would be required (P.A. 19a, 112a).

The district court reached the conclusion that the first of the foregoing two principles was applicable in this case. In other words, despite its acknowledgment of some differences in effects, it concluded without citation to the

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among others, have suggested additional feasible locations for a bridge crossing in the same area, none of which was considered at the 1964 hearings (Tr. 1596-98; PX 2, 3, 6).

[38] Both the district court and the court of appeals agreed that the evidence showed that between 1964 and 1969 changes had been made in the plans for the routing of traffic to and from the bridge and its connections (P.A. 19a, 114a-16a).

record that the location of the bridge project (including its ramps and interchanges) as proposed in 1969 would in fact have no different impact upon the public than the location of those facilities as considered at the 1964 hearing, so that no new location hearing would be required.

(b) *The holding of the Court of Appeals*

Focusing squarely on the last-mentioned factual conclusion of the district court—*i.e.*, that the 1969 proposed location would have no different impact on the public than the 1964 proposed location—the court of appeals could find nothing in the record "to support the conclusion but the conclusion itself" (P.A. 19a), and it therefore conditionally remanded this issue to the district court "for clarification of the factual basis of its conclusion" (P.A. 19a-20a).[39]

The petition's discussion of the foregoing holding is remarkable. It says that the court of appeals "set aside" the district court's ruling and held (a) that a location hearing can properly be held "only after final plans [for the project] have been made," and (b) that whenever a "minor" change is made in the "final plans" presented at the location hearing, a new location hearing must be held (Pet. 14). In fact the court of appeals said nothing of the kind. It did not even discuss "final plans" in its ruling with respect to location hearings, and it made clear that a "minor" change in location, which would not have a significantly different impact upon the public, would *not* require the holding of a new location hearing.[40] If this Court were now

[39]The remand was conditional in that the court of appeals recognized that the required "clarification" might become unnecessary if (for example) petitioners' compliance with *other* provisions of Title 23 required a location change for other reasons (P.A. 19a-20a).

[40]Thus the court of appeals explicitly stated that it had "no quarrel" with the district court's statement that no new location hearing is required where only an "insubstantial" change in plans is involved (P.A. 19a).

to review the location-hearing issue presented here, the Court's sole function would be to decide, not an issue of law, but only whether the particular evidentiary record in this case provided support for a specific factual conclusion voiced by the district court.

REASONS FOR DENYING THE WRIT

Petitioners assert that this case involves two sets of issues, each of which deserves review on certiorari: (1) four issues arising under Title 23 of the United States Code and (2) a single issue with respect to the interpretation of § 23 of the 1968 Highway Act. As to *neither* set is it contended that the decision below conflicts with other judicial decisions or that it constituted a departure from the accepted and usual course of judicial proceedings. The petition asserts only one recognized reason for granting certiorari—that the case involves important questions of Federal law that should be settled by this Court—but even that contention is advanced only as to the first set of issues and not as to the second. As to the latter question, petitioners' only argument is that the ruling below on a question of purely local law was in error, which is hardly a ground for seeking certiorari. As to the first set of issues (the Title 23 issues), no important question of Federal law is presented by the petition.

Moreover, it is important to recognize that the opinion of which review is now sought dealt with only *some* of the issues raised on the appeal below and was not the court's final decision. The court of appeals below deferred consideration of certain additional issues, as to which additional briefing was desired (P.A. 23a), and the eventual supplementary opinion by the court of appeals on the unresolved issues may well render the questions raised by the instant petition entirely moot as a practical matter.

A. THE ISSUES ARISING UNDER TITLE 23 OF THE U.S. CODE

1. Review and Reversal of the Dicta and Limited Factual Conclusions Challenged Here Would Be Useless

Three of the four Title 23 provisions upon which petitioners here rely (§§ 134, 109, and 138) required DOT to make certain factual determinations before allowing construction of the bridge project to proceed, and under *each* of those three provisions it was concluded below that there were problems involved which had not been adequately considered in the first instance so that a remand for reconsideration by DOT was required. Of those three "remands," however, not *one* would be affected by review by this Court because each rested upon an independent and adequate ground which is not now challenged by petitioners (*see* pp. 16, 17, 24 *supra*). This Court has long recognized that in such circumstances, since the most that could be accomplished by this Court's review would be "a useless and profitless reversal"—such review is wholly inappropriate.[41]

Moreover, the petition itself makes clear that its attack upon the court of appeals' handling of the Title 23 issues is purely factual; summarizing their Title 23 argument as a whole, petitioners "submit that, with respect to each of the Secretary's determinations, *the information before him was adequate*" (Pet. 7), which means that petitioners are simply asking this Court to review the particular evidentiary record presented in this unique case and to decide whether or not the particular "information" involved was "adequate" in

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[41] *See* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 635-36 (1875); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935). Review in such circumstances could give rise "to nothing more than an advisory opinion." Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945); Fay v. Noia, 372 U.S. 391, 428-30 (1963).

fact.[42] It has long been the policy of this Court, however, "not [to] grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

2. The Resolution of this Extraordinary Controversy Can Have No Effect As a Precedent for the Future

As should be apparent from the previous detailed discussion of the facts in this case, the official conduct involved is unique in the history of the Federal highway program. It is inherently improbable that any repetition would ever occur as a practical matter, and it is also the fact that there have been recent developments in the law which make any real repetition virtually impossible.

For example, it is now conceded that in 1969 the Secretary of Transportation, in making determinations under 23 U.S.C. § 138, was applying legal standards which were subsequently determined to be erroneous in the *Overton Park* litigation and that he was making his determinations without utilizing any administrative record and without preparing any kind of written findings or other record.[43] Recently, however, the erroneous legal criteria in use in 1969 have been

[42] Presumably the petitioners' argument, as so summarized, relates to 23 U.S.C. §§ 134, 109, and 138 and does not relate to § 128 but the issue presented under the latter provision is equally factual. As noted above, petitioners' only quarrel with the opinion below, as it relates to § 128, is with the court's statement that it could not accept, without further "clarification of the factual basis," a particular factual conclusion reached by the district court *(see* p. 27 *supra)*, which means that as to § 128 petitioners are asking this Court to grant certiorari merely for the purpose of determining whether the particular record in this case does or does not include evidence on a particular subject.

[43] In this case, for example, the Secretary had no administrative record before him when he allegedly approved the bridge project under § 138, and he claims to have made a purely "mental" finding without ever recording it or telling anyone he had made it (P.A. 92a).

set to one side,[44] and the Secretary has promulgated a whole new set of procedural regulations requiring the preparation of an extensive administrative record and detailed findings of fact with respect to the environmental issues posed under § 138.[45] The former comparatively casual approach taken by the Secretary with respect to § 138 problems, as exemplified in this case and in *Overton Park*, simply cannot be repeated, which means that review of that outmoded conduct now would have absolutely no significance for the future administration of the Federal highway program.

Similarly, significant legislative changes have subsequently been made in the requirements of the other three Title 23 provisions upon which petitioners here rely (§§ 109, 128, and 134),[46] and little would now be gained by review of the provisions as they existed before amendment.

3. The Narrow Factual Statements Challenged Here Were Clearly Correct

Once the record facts and the actual conclusions of the court below are clearly explained—as we have tried to do in our rather lengthy "Counterstatement"—we think that the petitioners' claims of certiorari-deserving error are hard to take seriously. For example, was it really error for the court of appeals to suggest to DOT that, when it reconsiders its alleged determination under 23 U.S.C. § 134 (as it must do, for reasons not now challenged by petitioners), DOT should make sure that sufficient planning has been done to provide a proper basis for the required determination? (*See*

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[44] *See* the Secretary's statement at the conclusion of the *Overton Park* litigation (O.A. 4a-5a).

[45] *See, e.g.*, DOT Order 5610.1 (Oct. 7, 1970), (referred to in *Overton Park*, 401 U.S. at 417-18 and nn. 31-32); DOT Policy and Procedure Memorandum 90-1 (Aug. 24, 1971) (reprinted at 117 Cong. Rec. E. 11596 (daily ed. Nov. 1, 1971)).

[46] *See, e.g.*, §§ 135, 136, 143, Pub. L. No. 91-605, 84 Stat. 1713 (1970). *See, also* National Environmental Protection Act, 42 U.S.C. § 4331.

P.A. 13a-15a; pp. 15-17 *supra*) Was it really error for the court of appeals to say that after the necessary remand under § 109; *if* unresolved safety questions still exist as to the bridge's foundations, they should be resolved "'to the fullest practical extent'" before construction? (*See* P.A. 16a; pp. 19-20 *supra*) Was it clearly erroneous for the court of appeals to conclude, factually, that in the peculiar circumstances of this case, where there had been no meaningful evaluation of the environmental impact of the bridge project, the Secretary's approval of the project under § 138 was "premature"? (*See* P.A. 10a-11a; pp. 23-24 *supra*) And finally, under § 128, when the district court had asserted a factual conclusion as to the value of a public hearing without citing any factual support therefore, was it really error for the court of appeals to remand the issue to the district court "for clarification of the factual basis of its conclusion"? (*See* P.A. 19a-20a; pp. 27-28 *supra*) We think these questions not only answer themselves in the negative but that the very statement of these essentially factual issues the only ones posed by the petition demonstrates the inappropriateness of their review by this Court.

B. THE ISSUE UNDER SECTION 23 OF THE 1968 HIGHWAY ACT

1. Petitioners Have Not Even Attempted To Show That This Purely Local Issue Meets the Usual Criteria for Review on Certiorari

The most striking aspect of petitioners' discussion of § 23 of the 1968 Highway Act is that there has been no attempt whatever to claim that the issue meets any one of the usual criteria for certiorari review. It is not even claimed that the issue is "important," either in the administration of the Federal highway program or otherwise. Petitioners' sole argument is that the court of appeals below has interpreted the statute erroneously.

Moreover, review of the issue posed by the petition under § 23 of the 1968 Highway Act would be inappropri-

ate for the simple reason that the statute, as challenged here, is a purely local statute relating to a single local highway project which has no national implications of any kind. The highest court of the District of Columbia has interpreted this District of Columbia statute for purely local purposes, and it has been the long-standing policy of this Court not to review such local decisions. *Del Vecchio v. Bowers*, 296 U.S. 280, 285 (1935); *General Motors Corp. v. District of Columbia*, 380 U.S. 553, 556 (1965).

2. Petitioners Seek Review at An Inappropriate Time

The § 23 ruling for which review is now sought was *not* made in the opinion below (dated October 12, 1971); it was enunciated on April 6, 1970, in a prior appeal (Pet. 4).[47] Petitioners sought rehearing as to the 1970 decision, but they did not then seek review of that decision by this Court. They acquiesced in the remand for trial, went to trial, and lost. On the second appeal (the proceeding below) they attempted to reopen the § 23 question, but in the latter proceeding the new panel of the court of appeals quite properly regarded the question as "no longer open" (P.A. 2a).

In the circumstances, we submit, the same must be said of the issue as now raised by petitioners. Whether or not they have technically waived their claim for review of the issue now (through their failure to seek review of the question when it was actually decided), review at this point in time would clearly be contrary to sound principles of judicial economy and administration.[47]

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[47] Following the court of appeals' opinion of April 6, 1970, at which time the court made its only decision on the § 23 issue, an enormous amount of time and effort was devoted to the case (through pretrial discovery, trial, and subsequent appellate proceedings) by the district court, the court of appeals, and all of the litigants involved (Pet. 4). If this Court were now to review and reverse the 1970 appellate determination as to the effect of § 23 of the 1968 Highway Act, all of that time and effort would have been wasted.

3. Petitioners' New-Found Interpretation of Section 23 Is Inconsistent with Their Own Long-Standing Administrative Interpretation and Is Plainly Wrong.

Petitioners now contend that, insofar as the bridge project is concerned, § 23 of the 1968 Highway Act excused them from complying with all four of the Title 23 provisions discussed in the petition (Pet. 16). That is squarely contrary to the position which they adopted both before and during this litigation. Specifically, (a) immediately after the passage of § 23 of the 1968 Highway Act, DOT itself interpreted that statute as requiring compliance (as to the bridge project) with 23 U.S.C. § 134 (*see* pp. 9-10 *supra*), and DOT has claimed in this case that in September 1969, feeling obliged to comply with § 134, it did so in fact (*see* p. 15, *supra*); (b) in the proceedings below petitioners expressly conceded the applicability of §§ 109 and 138 to the bridge project[48] and claimed that they complied in August-September 1969 (*see* pp. 17-18, 20-22 *supra*); and (c) in October 1969, DOT itself ordered the District Government to take the actions which DOT considered necessary to comply with § 128.[49]

The petition now presents a new theory to the effect that, despite petitioners' own prior administrative interpretation and attempted compliance, the four cited provisions were never applicable to the bridge project in the first

[48] *See* Dist. Defs. Mem. in Support of Defs. Motion for Summary Judgment (p. 11) in which it was expressly stated that "there is no doubt" that §§ 109 and 138 are "applicable" to the bridge project within the meaning of § 23 of the 1968 Highway Act.

[49] In September-October 1969 an official of DOT discovered that the District Government had not made the certifications required by § 128 and requested that the District Government make those certifications immediately (P.A. 134a; Tr. 446-47, 455-56, 1112). The district court found as a fact (in a finding which petitioners have never subsequently challenged) that the District Government's subsequent certification was made "for the purpose of complying" with § 128 but that the certification was without factual basis and was invalid (P.A. 134a-36a).

place. The theory is that in providing (in § 23) that some unspecified type of "work" on the bridge project begin within 30 days, Congress knew that the project had already been "planned," that Congress therefore wanted actual building to begin at once; and that Congress did not want petitioners to bother to comply with any highway law which would be either "time-consuming" or would require the "redoing" of things which had been done before the 1968 Act (Pet. 16-17). The factual premise (that the bridge project had already been "planned") is clearly wrong on the facts (*see* pp. 5-9 *supra*), and the resulting statutory interpretation is untenable on its face. For example, it obviously takes some amount of time to determine whether a project is safe under 23 U.S.C. § 109, but can it really be supposed that the Congress wanted DOT to proceed with a project which DOT considered "fraught with danger" without complying with this "time-consuming" provision?[50] Moreover, the court of appeals' 1970 decision that §§ 134, 109, 138, and 128 were applicable to the bridge did not in fact require petitioners to "redo" anything that had been done before § 23 was enacted; on the contrary, petitioners themselves have affirmatively claimed that virtually all of their compliance actions under those provisions were taken *after*, and not before, the passage of the 1968 Act.[51] Finally, petitioners' admittedly selective treatment of "only three" items from the complex legislative history involved

[50] Petitioners' theory rests upon constitutionally dubious assumptions as to who should decide which provisions were so "time-consuming" as to be inapplicable, and on what basis. Every provision of Title 23 is "time-consuming" to some extent, which means that under petitioners' theory the administrative officials would have had unfettered discretion to select for themselves the statutory provisions with which they wanted to comply and to set the rest aside. *But see, e.g.*, Panama Ref. Co. v. Ryan, 293 U.S. 388, 414-30 (1935); A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 529-42 (1935).

[51] Petitioners cite only one specific instance of something that had been done before; they say that "[h]earings had been held" (Pet. 16). As explained above, however, the hearings which had been held four years prior to the 1968 Act had related to a bridge at a different location with different ramps and approaches (*see* pp. 25-27 *supra*).

(Pet. 17-19) has been advanced without any attempt to meet or answer the contrary conclusion, based upon the *entire* legislative history, which was reached by the court of appeals in the 1970 opinion as to which petitioners never sought review (P.A. 172a-79a).

CONCLUSION

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

ROBERTS B. OWEN
GERALD P. NORTON
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Respondents

Of counsel:
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

February 1972

APPENDIX A

§ 23 of the Federal-Aid Highway Act of 1968 provides:

(a) Notwithstanding any other provision of law, or any court decision or administrative action to the contrary, the Secretary of Transportation and the government of the District of Columbia shall, in addition to those routes already under construction, construct all routes on the Interstate System within the District of Columbia as set forth in the document entitled "1968 Estimate of the Cost of Completion of the National System of Interstate and Defense Highways in the District of Columbia" submitted to Congress by the Secretary of Transportation with, and as a part of, "The 1968 Interstate System Cost Estimate" printed as House Document Numbered 199, Ninetieth Congress. Such construction shall be undertaken as soon as possible after the date of enactment of this Act, except as otherwise provided in this section, and shall be carried out in accordance with all applicable provisions of title 23 of the United States Code.

(b) Not later than 30 days after the date of enactment of this section the government of the District of Columbia shall commence work on the following projects:

(1) Three Sisters Bridge, I-266 (Section B1 to B2).

(2) Potomac River Freeway, I-266 (Section B2 to B4).

(3) Center Leg of the Inner Loop, I-95 (Section A6 to C4), terminating at New York Avenue.

(4) East Leg of the Inner Loop, I-295 (Section C1 to C4), terminating at Bladensburg Road.

(c) The government of the District of Columbia and the Secretary of Transportation shall study those projects on the Interstate System set forth in "The 1968 Interstate System Cost Estimate", House Document Numbered 199, Ninetieth Congress, within the District of Columbia which are

not specified in subsection (b) and shall report to Congress not later than 18 months after the date of enactment of this section their recommendations with respect to such projects including any recommended alternative routes or plans, and if no such recommendations are submitted within such 18-month period then the Secretary of Transportation and the government of the District of Columbia shall construct such routes, as soon as possible thereafter, as required by subsection (a) of this section.

Department of Transportation Policy and Procedure Memorandum 20-8 provides:

* * * * *

4. *Definitions.* As used in this PPM . . .

c. "Social, economic, and environmental effects" means the direct and indirect benefits or losses to the community and to highway users. It includes all such effects that are relevant and applicable to the particular location or design under consideration such as:

(1) Fast, safe and efficient transportation.
(2) National defense.
(3) Economic activity.
(4) Employment.
(5) Recreation and parks.
(6) Fire protection.
(7) Aesthetics.
(8) Public utilities.
(9) Public health and safety.
(10) Residential and neighborhood character and location.
(11) Religious institutions and practices.
(12) Conduct and financing of Government (including effect on local tax base and social service costs).
(13) Conservation (including erosion, sedimentation, wildlife and general ecology of the area).
(14) Natural and historic landmarks.

(15) Noise, and air and water pollution.
(16) Property values.
(17) Multiple use of space.
(18) Replacement housing.
(19) Education (including disruption of school district operations).
(20) Displacement of families and businesses.
(21) Engineering, right-of-way and construction costs of the project and related facilities.
(22) Maintenance and operating costs of the project and related facilities.
(23) Operation and use of existing highway facilities and other transportation facilities during construction and after completion.

This list of effects is not meant to be exclusive, nor does it mean that each effect considered must be given equal weight in making a determination upon a particular highway location or design.

* * * * *

6. *Hearing requirements.*

a. Both a corridor public hearing and a design public hearing must be held, or an opportunity afforded for those hearings, with respect to each Federal-aid highway project that:

(1) Is on a new location; or
(2) Would have a substantially different social, economic or environmental effect; or
(3) Would essentially change the layout or function of connecting roads or streets.

* * * * *

7. *Opportunity for public hearings.*

* * * * *

d. The opportunity for a public hearing shall be afforded in each case in which either the State highway department or the division engineer is in doubt as to whether a public hearing is required.

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APPENDIX B

DEPARTMENT OF TRANSPORTATION

NEWS

OFFICE OF THE SECRETARY

WASHINGTON, D. C. 20590

FOR IMMEDIATE RELEASE
January 21, 1972

DOT 4-72
Phone: (202) 426-4321

Secretary of Transportation John A. Volpe announced today that, in response to a recent Federal court decision, he will review the entire record to determine whether Interstate 40 in Memphis, Tennessee, should be completed in accordance with a plan that would require use of a strip of land in Overton Park, a large public park in downtown Memphis.

The project has been the focus of much attention since it was first approved in 1969, and was the subject of a major Supreme Court decision. In March 1971, the Supreme Court ordered the District Court in Memphis to undertake a thorough review of the administrative record underlying the Department of Transportation's actions on the project.

On January 5, 1972, U.S. District Judge Bailey Brown remanded the project to Secretary Volpe for a new decision on the location of the highway. Judge Brown held that Secretary Volpe could not have based his 1969 approval on the standards spelled out by the Supreme Court in its decision in March 1971. As originally proposed, the $1.8 million, highway project would have required the use of a 29-acre strip of parkland three-quarters of a mile in length. Because the Supreme Court had not yet addressed the issue in 1969, Judge Brown wrote: "Secretary Volpe, if he did consider alternatives to the park route, must have, however understandably, applied an incorrect standard."

At issue is Section 4(f) of the Department of Transportation Act of 1966. The provision permits the use of public parkland for highway purposes only when the Secretary finds that there is "no feasible and prudent alternative" and that the project includes "all possible planning to minimize harm" to the parkland.

Commenting on Judge Brown's decision, Secretary Volpe said: "I have asked for a complete analysis of the entire record that was before the court, with particular attention to alternative locations for this highway. That analysis will be done in the context of a thorough, detailed environmental impact statement, which is required by the National Environmental Policy Act. Once this analysis is complete, a new decision will be made."